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In the Supreme Court of the United States

OCTOBER TERM 1974

No. 74-603

KENNETH CARROL KINSER
Petitioner,

vs.

THE STATE OF FLORIDA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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The Petitioner, KENNETH CARROL KINSER, prays that this Honorable Court issue its Writ of Certiorari to the District Court of Appeal of Florida, Third District, to review the decision and judgment of the District Court of Appeal of Florida, Third District entered in the above-styled cause on February 26, 1974.

Petition for Rehearing was denied by the District Court of Appeal of Florida, Third District on March 26, 1974.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District was denied by the Supreme Court of the State of Florida on July 9, 1974.

CITATION TO OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District is reported at 291 So.2d 80 (Fla.3d Dist. 1974). The opinion, in the form sent to Petitioner, is set forth in its entirety in the Appendix to this Petition. (A. 1-2).

JURISDICTION

The opinion of the District Court of Appeal of Florida, Third District was rendered on February 26, 1974. (A. 1-2). Petition for Rehearing was denied by the District Court of Appeal of Florida, Third District on March 26, 1974. (A. 3). Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District was denied by the Supreme Court of Florida on July 9, 1974. (A. 4-5). An Order Extending Time To File Petition For Writ of Certiorari was signed by the Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, on September 23, 1974 extending the time to file the instant petition to and including November 18, 1974.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257 (3) because Petitioner has

been denied his right to due process of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution and has been denied his right to a trial by an impartial jury as guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution, by virtue of the decision and judgment of the District Court of Appeal of Florida, Third District and the inaction of the trial judge in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

The decision on which review is sought was rendered by the highest Court of the State of Florida in which a decision could be had as a matter of right.[1]

QUESTION PRESENTED FOR REVIEW

Whether a defendant in a criminal prosecution for second degree murder has been denied procedural due process of law as guaranteed to him by the Fourteenth Amendment to the United States Constitution and has been denied his right to a trial by an impartial jury as guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution where the defendant's trial counsel orally waived the defendant's right to trial by jury during a pre-trial hearing before the trial judge on a

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[1]This Honorable Court has recognized in *Williams v. Florida*, 399 U.S. 78 (1970), that the District Court of Appeal of Florida, Third District, is the highest court from which a decision could be had, in light of the nature of the appeal in the case *sub judice*. Though Florida adopted a new Judiciary Article in 1972 to replace its corresponding Judiciary Article in the Constitution of the State of Florida (1956), a review of the new Article V of the Constitution of the State of Florida will result in the same jurisdictional conclusion of law as that reached in *Williams v. Florida*, *supra*. *See* Fla. Const. Art. V, §§3(b) and 4(b) (1972).

motion for a continuance; the defendant was at all times during said hearing outside the courtroom unable to hear the proceedings inside; the defendant was taken before the clerk of court to sign a written waiver of trial by jury pursuant to order of the trial judge in accordance with Florida Rules of Criminal Procedure 3.260 (1972); the defendant signed his name below a stamped waiver form, the wording of which was not legible; and the trial judge never inquired of the defendant personally in open court as to whether the defendant knowingly, intelligently and voluntarily waived his right to trial by jury.

HOW THE FEDERAL QUESTION WAS PRESENTED

The Federal question was timely raised by Petitioner's Assignment of Error number 8, prepared pursuant to Petitioner's appeal to the District Court of Appeal of Florida, Third District and made a part of Petitioner's Record On Appeal. (A. 6-8).[2]

CONSTITUTIONAL PROVISIONS AND RULE OF COURT INVOLVED

Amendment VI to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

[2]Petitioner's present counsel was retained subsequent to Petitioner's trial for the purpose of appeal. Another attorney, who was not a member of present counsel's law offices, represented Petitioner at trial.

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV Section 1 to the United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Rules of Criminal Procedure 3.260 (1972)[3]

A defendant may, in writing, waive a jury trial with the approval of the court and the consent of the state.

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[3]This rule was in effect at the time of the Petitioner's alleged waiver of jury trial. Florida's rule of criminal procedure regarding waiver of jury trial is identical to its corresponding Federal rule of criminal procedure. Federal Rules of Criminal Procedure 23(a) provides: "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." Petitioner submits that any decision regarding the above quoted Florida rule of criminal procedure will also bind the Federal trial courts.

Florida amended Florida Rules of Criminal Procedure 3.260 effective February 1, 1973. This new rule reads: "A defendant may in writing waive a jury trial with the consent of the State." Since Petitioner's alleged waiver of jury trial occurred September 25, 1972, the instant case is governed by Florida's prior rule.

STATEMENT OF THE CASE

A direct information was filed on October 6, 1971 by the State Attorney of the Eleventh Judicial Circuit in and for Dade County, Florida charging Petitioner with the crime of second degree murder. (A. 9-10). On October 21, 1971 Petitioner was arraigned and entered a plea of not guilty. (A. 14).

On September 25, 1972 a pre-trial hearing was had before the trial judge for the purpose of obtaining a continuance of Petitioner's trial.[4] (A. 11-14). Present in the courtroom were the prosecutor and Petitioner's prior defense counsel.[5] (A. 11). In the midst of the hearing for a continuance prior defense counsel informed the trial judge that Petitioner was going to waive his right to jury trial. (A. 12). The prosecutor consented to this waiver, as required by Florida Rules of Criminal Procedure 3.260 (1972). (A. 13).

At all times during this hearing Petitioner was not physically present in the courtroom. Instead Petitioner was outside the door of the courtroom unable to hear the proceeding inside. (A. 11, 13). The trial judge ordered prior defense counsel to have Petitioner sign a waiver of jury trial pursuant to Florida Rules of Criminal Procedure 3.260 (1972). (A. 12).

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[4]The transcript of this hearing was inadvertently not included in Petitioner's Record On Appeal, as prepared by the clerk and transmitted to the District Court of Appeal of Florida, Third District. The transcript was submitted to the Third District Court of Appeal as an Appendix To Appellant's Brief and was before that Court as a supplement to Petitioner's Record On Appeal.

[5]See footnote 2, *supra*.

Petitioner was taken to the clerk of the trial court and signed his name to the information below a stamp, the wording of which was not legible. (A. 9). At no time during the pre-trial hearing did the trial judge inquire of Petitioner as to whether Petitioner knowingly, intelligently and voluntarily waived his right to trial by jury.[6] (A. 11-13).

Without the benefit of jury trial Petitioner was accorded a brief trial by his prior defense counsel on March 23, 1973. (A. 15-17), the transcript of which was

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[6]Petitioner related to present counsel several facts which do not appear in Petitioner's Record On Appeal, since the related facts resulted from conversations outside of court between Petitioner and his prior defense counsel.

Prior defense counsel desired that Petitioner plead guilty but Petitioner refused. During the September 25, 1972, pre-trial hearing Petitioner was sitting in the hall outside the courtroom and did not hear what was transpiring inside the courtroom. Petitioner's prior defense counsel came out of the courtroom into the hall and for the first time told Petitioner that he was going to waive trial by jury. Petitioner desired a trial by jury. Petitioner's attorney stated that the purpose of waiving jury trial was to give Petitioner more time before the trial, *i.e.*, to obtain a delay. The attorney assured Petitioner that Petitioner could still get a jury trial in spite of the waiver. Petitioner was told by his attorney what he was signing. Petitioner did not read the stamped waiver. Petitioner did not remember whether anyone explained to him his right to trial by jury. The day before trial Petitioner's attorney brought in a second atorney to assist at trial. Prior defense counsel recommended a plea. Petitioner's wife argued against such a course of action. Petitioner was told on the day before trial that if he wanted to he could get another attorney.

In *Floyd v. State*, 90 So.2d 105 (Fla.1956), the Supreme Court of the State of Florida stated that withdrawal of a waiver of jury trial was discretionary with the trial judge and such motion to withdraw should be refused by the court when "not seasonably made in good faith, or is made to obtain a delay, or it appears that some real harm will be done to the public." *Accord, Baker v. Wainwright*, 245 So.2d 289 (Fla.4th Dist.1971). Under Florida case law, Petitioner was not

ninety-five (95) pages in length.[7] Prior counsel stipulated to several facts.[8] The State called only one witness who testified *inter alia* that a dispute arose over the fear that the victim was taking drugs, that Petitioner did not want the victim around if he was taking drugs, that the victim struck Petitioner knocking him to the ground, and that Petitioner drew a gun and shot the victim.[9] The State rested its case.[10] The trial court denied Petitioner's motion for judgment of acquittal but reduced the charge to manslaughter.[11] (A. 16). The Petitioner testified that he fired in self-defense.[12] Five additional defense witnesses, none of whom were present at the scene of the alleged crime, presented corroborating evidence and testified to Petitioner's good character.[13] The trial court adjudicated Peti-

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guaranteed that he could reacquire his right to jury trial, as prior counsel had indicated. Ignorance, incomprehension and inducements destroy the voluntariness of a waiver of a fundamental constitutional right. *Boykin v. Alabama*, 395 U.S. 238 (1969). Assuming *arguendo* that the Record On Appeal indicates a knowing and intelligent waiver of Petitioner's right to trial by jury, the above facts related to present counsel indicate that Petitioner's waiver in the instant case was not voluntary. The above facts demonstrate more compellingly than those facts which appear from the Record On Appeal the need for a trial judge to conduct an inquiry of a defendant as to whether the defendant knowingly, intelligently and voluntarily waives his right to trial by jury.

[7](R. 1-95). The Record On Appeal, including the transcript of the trial, will be sent to this Honorable Court. The transcript of the trial is not made a part of the Appendix to this petition. Consequently, Petitioner has footnoted references to the Record On Appeal to substantiate any facts which do not appear in the Appendix to this petition.

[8](R. 3, 4).

[9](R. 6-44).

[10](R. 45).

[11](R. 44, 45).

[12](R. 45-65).

[13](R. 65-91).

tioner guilty of manslaughter.[14] (A. 17). Petitioner was sentenced to three (3) years in the state penitentiary.[15] (A. 19). Petitioner's only prior conviction was for disorderly conduct.[16]

The District Court of Appeal of Florida, Third District directly and exclusively addressed the issue presented to this Honorable Court. In affirming Petitioner's conviction in a per curiam opinion, that Court worded the issue before it as solely concerning failure of the trial court to inquire of Petitioner as to whether his waiver of trial by jury was voluntarily made. (A. 2). That court ignored the additional issue of whether the waiver was knowingly and intelligently made, which issue was concurrently raised in Petitioner's assignments of error and brief. (A. 6-7). The Third District held that since Petitioner's trial counsel orally waived jury trial and since the trial court ordered Petitioner to sign a written waiver, there was full compliance with Florida Rules of Criminal Procedure 3.260 [1972] and no reversible error.[17] (A. 2).

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[14](R. 97).

[15](R. 95).

[16](R. 91).

[17]In affirming the instant case, the District Court of Appeal of Florida, Third District, relied on a prior Third District decision, *Quartz v. State*, 258 So.2d 283 (Fla.3d Dist.1972). In *Quartz, supra*, that Court held that the mere facts that the defendant signed his information on which was stamped "waived trial by jury with approval of court and consent of state" and that oral waiver of trial by jury was made by private counsel for defendant were sufficient to withstand a constitutional challenge to the failure of the trial judge to interrogate the defendant as to whether he had intelligently and knowingly waived his right to a jury trial.

REASONS FOR GRANTING THE WRIT

In *Patton v. United States*, 281 U.S. 276 (1930) this Court held that a defendant may waive his Sixth Amendment right to trial by jury.[18] However, in sanctioning such a waiver this Court cautioned:

> Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. *And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion*, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

Patton v. United States, supra at 312, 313 (emphasis added). Petitioner seeks to resolve whether the due process clause of the Fourteenth Amendment imposes an affirmative duty on a Florida trial judge to personally inquire of a defendant in order to ascertain whether he knowingly, intelligently and voluntarily waives his Sixth Amendment

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[18]The Sixth Amendment right to trial by jury applies to the States through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

right to trial by jury.[19] This issue poses a federal question of substance which has not been determined by this Court.[20]

In *Boykin v. Alabama*, 395 U.S. 238 (1969) this Court held that it was error, plain on the face of the record, for

[19]The American Bar Association Project On Standards For Criminal Justice, Trial By Jury (Approved Draft 1968) provides in Standard 1.2(b) that "the court should not accept a waiver unless the defendant, *after being advised by the court of his right to trial by jury*, personally waives his right to trial by jury, either in writing or in open court for the record." Commentary on this standard states at pages 37 and 38:

> As with other important rights, the right to trial by jury cannot be said to have been effectively waived unless the defendant has acted voluntarily and knowingly. E.g., Dranow v. United States, 325 F.2d 181 (8th Cir.1963). It is important, therefore, that sufficient procedures be provided to minimize the chances of an involuntary of unknowing waiver and to provide a basis for an accurate after-the-fact determination of the defendant's intentions. To this end, the standard provides that: (1) the defendant be advised of his right to jury trial; . . . .
>
> It may well be that a defendant who has been informed by his counsel or is otherwise aware of his right to trial by jury may intelligently waive that right without further admonishment from the court. However, consistent with the approach which has been taken with regard to entry of a plea of guilty, the better practice is for the court to advise the defendant of his right to jury trial before accepting a waiver. As one court has observed, " 'the serious and weighty responsibility' of determining whether [the defendant] wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make 'an intelligent and competent waiver.' " Cross v. United States, 325 F.2d 629 (D.C.Cir.1963).

[20]Florida Rules of Criminal Procedure 3.260 (1972), pursuant to which the alleged waiver of jury trial was had, is identical to Federal Rules of Criminal Procedure 23(a). *See* footnote 3. In interpreting Federal Rule 23(a) this Court concluded in *Singer v. United States*, 380 U.S. 24 (1965), that Rule 23(a) sets forth a reasonable procedure governing attempted waivers of jury trial. However, to conclude that a procedure is "reasonable" is not synonymous with a holding that a waiver "in writing with the approval of the court and the consent of the government" is all that the Constitution requires to make a waiver of jury trial valid and binding.

a state trial judge to accept a defendant's guilty plea without an affirmative showing that it was intelligent and voluntary. This Court noted six defilers that render a waiver of a constitutional right involuntary: ignorance, incomprehension, coercion, terror, inducements, and subtle or blatant threats. The fact that a guilty plea simultaneously waives the Fifth Amendment privilege against compulsory self-incrimination, the Sixth Amendment right to confront one's accusers, *and the Sixth Amendment right to trial by jury* led to the *Boykin* holding. This Court stated that inquiry of the accused by the trial judge to make sure that he has a full understanding of what the plea connotes and of its consequences leaves a record adequate for any review that might later be sought and forestalls the spin-off of collateral proceedings that seek to probe murky memories. Likewise in dealing with Federal guilty plea procedure this Court stated in *McCarthy v. United States*, 394 U.S. 459 (1969) that a federal district judge must personally inquire whether a defendant understands the nature of the charge against him and by so inquiring the judge will facilitate his own determination of a guilty plea's voluntariness. "If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy, supra*, at 466.[21]

[21]Federal Rules of Criminal Procedure 11 (effective July 1, 1974) now provides an explicit procedure to be followed before a trial judge accepts a guilty plea:

> (c) Advice to defendant.—The court shall not accept a guilty plea . . . without first by addressing the defendant personally in open court, informing him of and determining that he understands the following:
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> * * *
> * * *
> * * *
>
> (4) that if he pleads guilty . . . there will not be a further trial of any kind, so that by pleading guilty . . . he waives the right to trial.

This Court has held that for a defendant to knowingly, intelligently and voluntarily be said to waive his Fifth Amendment privilege against self-incrimination procedural safeguards—i.e. warnings read by the police who are seeking the waiver—are constitutionally required. *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial judge must, consistent with the Fourteenth Amendment, ascertain at a hearing whether a Fifth Amendment waiver is voluntary. *Jackson v. Denno*, 378 U.S. 368 (1964).

In *Taylor v. United States*, ___ U.S. ___, 94 S.Ct. 194, 38 L.Ed. 2d 174 (1973) this Court held that a defendant's waiver of his Sixth Amendment right to confront witnesses against him was not vitiated where it had not been demonstrated that the defendant knew or had been expressly warned by the trial court not only that he had a right to be present but also that the trial would continue in his absence and thereby effectively foreclose his right

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(d) Insuring that the plea is voluntary.—The court shall not accept a plea of guilty . . . without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty . . . results from prior discussions between the attorney for the government and the defendant or his attorney.

Likewise Florida Rules of Criminal Procedure 3.170(j) (1973) provides:

> No plea of guilty . . . shall be accepted by a court without first determining, in open court, with means of recording the proceedings . . . that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.
>
> A complete record of the proceedings at which a defendant pleads shall be kept by the court.

to testify and to confront personally the witnesses against him. However, this Court emphasized that in *Taylor, supra,* no challenge was made to the trial court's conclusion that the defendant's absence from the trial was voluntary.

Thus, of the three constitutional rights, the waiver of which gave birth to the detailed trial court inquiry required by *Boykin v. Alabama, supra,* and *McCarthy v. United States, supra,* only the trial court's inquiry of a defendant prior to waiver of the right to trial by jury has not been addressed by this Court.

Whether Petitioner may be said to have made a knowing, intelligent and voluntary waiver of his Sixth Amendment right to trial by jury must be determined by the unique circumstances of the instant case. *Adams v. United States,* 317 U.S. 269 (1942). The instant facts must be evaluated by the following constitutional standards. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). The question of an effective waiver of a federal constitutional right in a proceeding is governed by federal standards. *Boykin v. Alabama,* 395 U.S. 238 (1969). "[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 393 (1937). Aquiescence in the loss of fundamental rights is not to be presumed. *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 U.S. 292 (1937). In *Carnley v. Cochran,* 369 U.S. 506, 516 (1962) this Court stated:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that

> an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not a waiver.

Finally, this Court has stated that when dealing with the waiver of jury trial, the burden is on the prosecution to show that a claimed waiver was knowingly and voluntarily made. *Barker v. Wingo*, 407 U.S. 514 (1972).

The facts of the instant case as they appear in the Record On Appeal fall short of meeting the above constitutional standards. Petitioner's trial attorney orally waived Petitioner's right to trial by jury. (A. 11-13). Petitioner was not present in the courtroom at this time, but was outside the courtroom. (A. 11). This Court has stated in *Brookhart v. Janis*, 384 U.S. 1 (1966) that the constitutional rights of a defendant cannot be waived by his counsel under all circumstances.[22] The only action taken by the trial judge was a verification from defense counsel and the prosecutor as to whether there was to be a waiver of the right to jury trial and finally, an ordering of Petitioner's prior defense counsel that Petitioner "sign the waiver now". (A. 12). The trial court conducted no inquiry of Petitioner regarding his waiver of the right to jury trial.[23] (A. 11-13). The actions of the trial judge

[22]The circumstances of the instant case, which do not appear as a matter of record, suggest that the instant case would fall within those circumstances which would preclude a waiver of a constitutional right by a defendant's trial counsel. *See* footnote 6, *supra*.

[23]Though not addressing the instant issue, this Court was quick to point out in *Brookhart v. Janis*, 384 U.S. 1 (1966), that when the defendant's appointed counsel told the trial judge that the defendant had signed waivers of trial by jury and wanted to be tried by the court, "[t]he judge in order to verify the waivers showed [the defendant] the two written waivers of trial by jury bearing his signature and asked him if the signature was his. [The defendant] said it was." *Brookhart v. Janis, supra*, at 5.

display "a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused." *Glasser v. United States*, 315 U.S. 60, 72 (1942).[24] Petitioner came before the clerk of court and signed his name below a stamped waiver form, the wording of which was *illegible*. (A. 9). The signing of the instant alleged waiver presents a distinct contrast to the situation in *Adams v. United States*, 317 U.S. 269 (1942) where the record before this Court showed that the defendant in person before the trial judge submitted a writing over his signature which read "I, Gene McCann the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional rights." *Adams v. United States, supra*, at 271. Petitioner submits that the instant record on its face does not demonstrate a *knowing and intelligent waiver* of Petitioner's Sixth Amendment right to trial by jury.

Assuming *arguendo* that the instant record does demonstrate a knowing and intelligent waiver of Petitioner's constitutional right, the record must also demonstrate that Petitioner's waiver was *voluntary*. The issue of whether a waiver of a constitutional right is knowing and intelligent is an issue distinct from whether a waiver is voluntary. This Court stated in *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (emphasis added) that "if a defendant's guilty plea is not *equally* voluntary and

[24]In *Glasser v. United States*, 315 U.S. 60 (1942), this Court held that a defendant was denied his Sixth Amendment right to counsel where the trial judge failed to reascertain, after the defendant previously voiced an objection, the defendant's attitude toward being represented by an attorney with interests conflicting with those interests of the defendant. The alleged waiver of the defendant's right was held not to be demonstrated by the record before this Court.

knowing, it has been obtained in violation of due process and is therefore void." *See Taylor v. United States*, ___ U.S.___, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973); *Boykin v. Alabama*, 395 U.S. 238 (1969). Nothing in the instant record demonstrates that Petitioner voluntarily waived his right to jury trial.[25]

This Court stated in *Patton v. United States*, 281 U.S. 276, 312 (1930) that "the duty of the trial court [in accepting a waiver of jury trial] is not to be discharged as a mere matter of rote, but with sound and advised discretion . . . ." Petitioner submits that the facts of the instant case show that the trial judge's actions in dealing with Petitioner's alleged jury waiver were as close to being "a mere matter of rote" as a fact pattern can come. Petitioner queries how a trial judge can accept a waiver of jury trial, "with sound and advised discretion" if the trial judge conducts no personal inquiry of the defendant who is allegedly waiving his right to jury trial—let alone, if the judge accepts a waiver when the defendant is not present before him at the time of the alleged waiver. As indicated by the District Court of Appeal of Florida, Third District in its opinion in the case *sub judice*, (A. 1-2), the bare facts do comply with Florida Rules of Criminal Procedure 3.260 (1972) that "[a] defendant may, in writing, waive a jury trial with the approval of the court and the consent of the state." Petitioner submits that the scant requirements of Florida Rules of Criminal Procedure 3.260 (1972) are insufficient to safeguard the fundamental

[25]Alleged facts related to present counsel indicate that Petitioner's waiver of jury trial was in fact involuntary. *See* footnote 6, *supra*, for a recitation of these facts. Had the trial judge made inquiry of Petitioner before accepting his alleged waiver, either the instant challenge to voluntariness would have been precluded by the Record On Appeal or there would have been no waiver of jury trial.

constitutional right to trial by jury. The Fourteenth Amendment demands something more.

As Justice Douglas stated in his dissenting opinion in *Adams v. United States*, 317 U.S. 269, 283, 284 (1942), "[t]he point is that we should not leave to sheer speculation the question whether his waiver of a jury trial was intelligent and competent." The caution of Justice Murphy clearly demonstrates his sagacious insight into the problems surrounding the waiver of a jury trial, when viewed in the light of the facts of the instant case.

> [I]f it is assumed that jury trial, the prized product of the travail of the past can be waived by an accused, there should be compliance with rigorous standards, adequately designed to insure that an accused fully understands his rights and intelligently appreciates the effects of his step, before a court should accept a waiver.

Adams v. United States, 317 U.S. 269, 286, 287 (1942) (dissenting opinion).

CONCLUSION

The Petitioner herein was denied basic fundamental rights guaranteed to him by the United States Constitution. He seeks relief in this Court to restore those rights to him. Based on the arguments and authorities cited herein, Petitioner, KENNETH CARROL KINSER, respectfully requests this Honorable Court to grant a Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District.

Respectfully submitted,

LAW OFFICES OF
PHILIP CARLTON, JR.

By:
PHILIP CARLTON, Jr.
Counsel for Petitioner
Suite 217 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari To the District Court of Appeal of Florida, Third District, was mailed this 15th day of November, 1974 to the Office of the Attorney General, 8585 Sunset Drive, Miami, Florida, 33143 and to the Honorable William P. Carter, Clerk of the District Court of Appeal of Florida, Third District, 1350 N. W. 12th Avenue, Miami, Florida, 33136.

PHILIP CARLTON, JR.

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1974

CASE NO. 73-403

KENNETH CARROLL KINSER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed February 26, 1974.

An Appeal from the Criminal Court of Record for Dade County, Paul Baker, Judge.

Philip Carlton, Jr., and Rex Ryland, Jr., for appellant.

Robert L. Shevin, Attorney General, and William L. Rogers, Assistant Attorney General, and Gary M. Carman, Legal Intern, for appellee.

Before PEARSON, CARROLL and HENDRY, JJ.

PER CURIAM.

Appellant was convicted of manslaughter upon an information charging him with second degree murder. He was sentenced to five years imprisonment.

On this appeal, the appellant, seeks reversal on the ground that the trial judge did not adequately determine whether appellant's waiver of his right to a jury trial was made voluntarily.

The record demonstrates that appellant's trial counsel orally waived jury trial, and the court ordered the appellant to sign a written waiver in open court. We think there has been full compliance with CrPR 3.260, 33 F.S.A., in this cause, and no reversible error has been shown. See Quartz v. State, Fla. App. 1972, 258 So.2d 283.

Therefore, the judgment and sentence are affirmed.

Affirmed.

App. 3

[TITLE OMITTED]

TUESDAY, MARCH 26, 1974

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

/s/ William P. Carter

Clerk District Court of Appeal,
Third District

cc: Rex Ryland, Jr.
William L. Rogers

/h

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

App. 4

SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1974

TUESDAY, JULY 9, 1974

CASE NO. 45,366

DISTRICT COURT OF APPEAL,
THIRD DISTRICT
No. 73-403

KENNETH CARROL KINSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., ROBERTS, ERVIN, DEKLE and OVERTON, JJ., concur.

MR

cc: Hon. William P. Carter, Clerk
Hon. Richard P. Brinker, Clerk
Hon. Paul Baker, Judge

Hon. Philip Carlton, Jr.
Hon. William L. Rogers

A True Copy

TEST:

/s/ Sid J. White

Sid J. White
Clerk Supreme Court.

[136]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NUMBER 71-7571 (CR. DIV.)
73-403

THE STATE OF FLORIDA,

Plaintiff,

vs.

KENNETH KINSER,

Defendant.

ASSIGNMENTS OF ERROR

[Filed for Record June 27, 1973, 10:31 A.M.

Richard P. Brinker, Clerk, Circuit & County Cts.
Dade County, Fla.]

COMES NOW the Defendant, KENNETH KINSER, by and through his undersigned attorney, and files these, his Assignments of Error on which they intend to rely in the District Court of Appeals of Florida, Third District, for reversal of those certain Judgments and Sentences entered by the Honorable Paul Baker of the Criminal Court of Record in and for Dade County, Florida and would show as follows:

1. That the Court erred in that the verdicts were contrary to law.

2. That the Court erred in that the verdicts were contrary to the evidence.

3. That the Court erred in that the verdicts were contrary to the manifest weight of the evidence.

4. That the Court erred in that the verdicts were not supported by the evidence.

5. That the Court erred in that the verdict were contrary to the law and evidence.

6. That the Court erred in that the verdicts were contrary to the sufficiency of the evidence.

7. That the Court erred in allowing testimony as a matter of fact and as a matter of law.

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8. That the Defendant's waiver trial by jury was not voluntarily executed nor was it an intelligent waiver of his Constitutional rights.

LAW OFFICES OF
PHILIP CARLTON, JR.
Attorney for Defendant
19 West Flagler, Suite 217
Miami, Florida 33130

By: Rex Ryland, Jr.

I HEREBY CERTIFY that a true and correct copy of the foregoing Assignments of Error was mailed to the Office of the Honorable Robert L. Shevin, Attorney General, 1350 N.W. Twelfth Avenue, Miami, Florida, 33125, and a copy was mailed to the Office of Honorable Richard E. Gerstein, State Attorney, 1351 N.W. Twelfth Street, Miami, Florida, 33125, this 25th day of June, 1973.

Rex Ryland, Jr.

IN THE CRIMINAL COURT OF RECORD, in and for Dade County, State of Florida,

August Term, 19 71.

71-7571

THE STATE OF FLORIDA

vs.

KENNETH CARROLL KINSER

INFORMATION FOR

SECOND DEGREE MURDER

FILED
OCT 6 1971
J. R. McCRACKEN
CLERK

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that

KENNETH CARROLL KINSER

on the 16th day of June, 19 71, in the County and State aforesaid, by his act imminently dangerous to another and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual, did kill and murder one RICHARD T. BATES by shooting him with a pistol, a further and more particular description thereof being to the State Attorney unknown, being in violation of 782.04 Florida Statutes,

Case No. J.P. 71-7571

Criminal Court of Record

DADE COUNTY, FLORIDA

THE STATE OF FLORIDA

vs.

KENNETH CARROLL KINSER

INFORMATION FOR

SECOND DEGREE MURDER

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

State Attorney,
Eleventh Judicial Circuit of Florida

JMB

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, RICHARD E. GERSTEIN, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense ~~therein~~ charged.

SUBSCRIPTION TRANSMITTED IN GOOD FAITH AND SUBSCRIBED UNDER OATH

State Attorney,
Eleventh Judicial Circuit of Florida

Sworn to and subscribed before me this 6 day of October, 19 71.

J. F. McCracken, Clerk
Criminal Court of Record, Dade County, Florida

SEAL: CRIMINAL COURT OF RECORD

By: Josephine O'Neill, D.C.

IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA
(Formerly Criminal Court of Record)

NO. 71-7571

STATE OF FLORIDA,

Plaintiff,

vs.

KENNETH KINSER,

Defendant.

The above-entitled cause came on for hearing before the Honorable Paul Baker, Judge of the above-styled court, at the Metropolitan Dade County Justice Building, Miami, Florida, on the 25th day of September, 1972, commencing at approximately 9:00 o'clock a.m.

APPEARANCES:

JACK BLUMENFELD and
ALAN THAYER McLAREN,
Assistant State Attorneys,
on behalf of the State of Florida.

ARTHUR W. KARLICK, ESQUIRE,
on behalf of the Defendant.

MR. McLAREN: Kenneth Kinser.

MR. KARLICK: Judge, the Defendant is outside the door.

The Defendant is a family man with five children. He is in the process of finishing a house he built for this family, Judge, and we are asking for a short continuance to finish this.

This is a construction man, Judge.

And, in addition, Judge, we are waiving jury.

State has no objection, I understand, to a continuance.

MR. BLUMENFELD: No.

THE COURT: Is that right, Mr. Blumenfeld?

MR. BLUMENFELD: I'm sorry, Judge?

THE COURT: Is his statement accurate?

MR. BLUMENFELD: About what? I have an objection or not?

Yes, it's accurate.

THE COURT: Yes, it's accurate.

MR. BLUMENFELD: If he is here, why don't you—

MR. KARLICK: He is here.

THE COURT: Have him sign the waiver now.

THE CLERK: Waiver of jury.

MR. BLUMENFELD: Well, the continuance on him, waive speedies.

MR. KARLICK: We have already waived that long ago when you were at a seminar. We waived that.

THE CLERK: Are we waiving jury?

MR. BLUMENFELD: Yes.

MR. KARLICK: Yes.

THE COURT: November 10th at 2:00.

(Thereupon the hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
: SS.
COUNTY OF DADE)

I, VIRGINIA SAVALLI, hereby certify that the foregoing transcript, pages 1 through 3, is a true and correct transcript of the proceedings had in the cause of STATE OF FLORIDA, Plaintiff, versus KENNETH KINSER, Defendant, Case No. 71-7571, pending in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, (Formerly Criminal Court of Record), before the Honorable Paul Baker, presiding Judge, on September 25, 1972.

IN WITNESS WHEREOF I hereunto set my hand this 27th day of August, 1973.

/s/ Virginia Savalli
Court Reporter

[99]

MINUTES OF THE CLERK OF THE COURT

(On October 21, 1971, the Clerk of the Court entered in Criminal Court of Record Minute Book No. 513, on Page 174, the following minutes, to wit:)

Division "B" October 21, 1971

* * *

STATE OF FLORIDA
VS. #71-7571 SECOND DEGREE MURDER
KENNETH CARROLL KINSER

James Woodard, Assistant State Attorney.

Art Karlick, Counsel for Defendant.

Reported by Ginger Savalli.

The Defendant was arraigned and Pleaded not guilty.

The Court granted the Defendant thirty (30) days leave within which to file any motions he may be advised, including motions directed toward the Information.

* * *

[100]

(And on September 25, 1972, the Clerk of the Court entered in Criminal Court of Record Minute Book No. 558, on Page 619, the following minutes, to-wit:)

DIVISION "B" September 25, 1972

* * *

STATE OF FLORIDA
vs. #71-7571 SECOND DEGREE MURDER
KENNETH CARROLL KINSER

Jack R. Blumenfeld, Assistant State Attorney.

Arthur W. Karlick, Counsel for the Defendant.

Reported by Ginger Savalli.

The Defendant waived trial by jury.

* * *

(And on March 23, 1973, the Clerk of the Court entered in Circuit Court, Criminal Division Minute Book No. 15, on Pages 542 and 543, the following minutes, to-wit:)

Judge Paul Baker March 23, 1973

* * *

STATE OF FLORIDA
vs. #71-7571 SECOND DEGREE MURDER
KENNETH CARROLL KINSER

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Michael Morgan and Ira L. Dubitsky, Assistant State Attorneys.

William J. Swink, Arthur Karlick and Judson Bruce Phelps, Counsel for the Defendant.

Reported by Joanne Santiago.

The Court granted William J. Swink's Order Granting Leave for Withdrawal of Counsel.

All the witnesses and the Defendant were sworn and the Rule was invoked at the request of the State.

The respective Counsel stipulated and agreed to certain facts alleged in the Information.

The Court admitted into evidence the following item:

Autopsy Protocol ..... State's Exhibit #1

State's Witnesses:

1. Daniel P. Green

State rests.

mcm Continued on next page

BOOK 15 PAGE 542

Judge Paul Baker March 23, 1973

The Court denied the Defendant's oral Motion for a Judgment of Acquittal, reducing the Charge to "Manslaughter".

Defendant's Witnesses:

1. Kenneth Carroll Kinser—Defendant

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2. Shirley Stanley

3. Bill Parker

4. James Daniel Kelley

5. Robert Edmond May

6. Charmine Ruth Kinser

Defendant rests.

State rests.

The Court adjudged the Defendant guilty of "Manslaughter" and sentenced him as follows:

SEE BOOK 4, PAGE 692

* * *

[123]

BENCH DOCKET

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY
Case No. 71-7571
STATE OF FLORIDA
vs.

KENNETH CARROLL KINSER

CHARGE, SECOND DEGREE MURDER

(Filed March 23, 1973)

(Richard P. Brinker, Clerk)

JUDGMENT

It appearing unto this Court that you Kenneth Carroll Kinser have been regularly tried and convicted of Manslaughter.

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that you be imprisoned by confinement at hard labor in the STATE PENITENTIARY for a term of Three (3) years.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 23rd day of March A.D., 1973.

/s/ Paul Baker,

PAUL BAKER, Judge

FILED AND RECORDED
IN CIRCUIT COURT
MINUTES AS INDICATED HEREON

Richard P. Brinker, Clerk

By: DORIS McVAY

Deputy Clerk

BOOK 4, PAGE 892

LIBRARY

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-602

KENNETH CARROL KINSER,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

ROBERT L. SHEVIN
Attorney General
State of Florida

WILLIAM L. ROGERS
Assistant Attorney General
Sunset Executive Center
8585 Sunset Drive
Miami, Florida 33143
(305) 279-8700

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OPINION BELOW

The opinion of the District Court of Appeal of Florida, Third District is reported at 291 So.2d 80 (Fla., 3rd DCA, 1974). The opinion is reproduced in the Appendix to the Petition for Certiorari at A 1-2.

JURISDICTION

The jurisdictional requisites are set forth in the Petition. However, respondent contests the fact that jurisdiction in this Honorable Court has been properly invoked inasmuch as based upon the following facts and authorities no substantial federal question has been made to appear.

QUESTION PRESENTED FOR REVIEW

WHETHER A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE OPINION BELOW WHICH HELD THAT THERE WAS NO VIOLATION OF PETITIONERS' CONSTITUTIONAL RIGHTS WHERE WAIVER OF TRIAL BY JURY WAS ANNOUNCED TO THE COURT BY

THE PETITIONER'S PRIVATELY RETAINED ATTORNEY, AND SUBSEQUENTLY THE PETITIONER HIMSELF SIGNED A WRITTEN WAIVER OF TRIAL BY JURY IN OPEN COURT WITH APPROVAL OF THE COURT AND THE CONSENT OF THE STATE?

HOW THE FEDERAL QUESTION WAS PRESENTED

The issue before this Court was first raised by the petitioner on direct appeal from his conviction. At that time through his assignment of error number 8 the defendant asserted that his waiver of trial by jury was not voluntarily executed nor was it an intelligent waiver of his constitutional rights. It should be noted that at no time did the defendant seek to withdraw his waiver before the trial judge nor did he seek to apprise the trial judge of any of the errors now asserted by means of a motion for new trial.

STATEMENT OF THE CASE AND FACTS

The Statement of the Case as set forth by the petitioner substantially reflects the proceedings in the court below. However, respondent takes

issue with the inclusion of petitioners Footnote number 6 attempting to set forth certain additional "facts which do not appear" in the record on appeal. These "facts" admittedly were obtained by counsel from several conversations which took place outside of the courtroom between the petitioner and his prior attorney. These "facts" have never been presented to any prior reviewing court, have no basis in any prior records of the instant cause and are now entirely improper in a petition for certiorari before this Honorable Court.

ARGUMENT

The threshold question for determination of petitioner's present challenge before this Court is whether the record developed on appeal in the state courts is adequate to support and fully explore the constitutional issues he seeks to raise. At least a major portion of the necessary facts in support of petitioner's cause are set forth by means of Footnote #6 to petitioner's Statement of the Case. It is admitted by the petitioner that the aforesaid facts do not appear in petitioner's record on appeal since these very same facts resulted not from development at any judicial proceeding but only from hearsay

conversation between counsel and the petitioner outside of court. It is incumbent on the petitioner to develop a record sufficient to support review. This he clearly has not done. This failing becomes even more glaring in light of the procedure provided by the Florida Rules of Criminal Procedure for development of post-conviction relief. Rule 3.850, Florida Rule of Criminal Procedure, is a direct counterpart to Section 2255 of Title 28 United States Code. The rule, promulgated by the Florida Supreme Court, was intended to provide a complete and efficacious post-conviction remedy to correct convictions on any grounds which subject them to collateral attack. See Roy v. Wainwright, 151 So.2d 825 (Fla. 1963). The rule provides for relief on any of four grounds: (1) that the sentence was imposed in violation of the constitution or laws of the United States or of the State of Florida, (2) that the sentencing court lacked jurisdiction, (3) that the sentence was in violation of the maximum authorized by law, or (4) that the sentence is otherwise subject to collateral attack. By vesting jurisdiction in the trial court, the original trial judge is empowered to conduct an evidentiary hearing and if necessary correct any error going to the validity of the judgment and sentence. State v. Wooden, 246 So.2d 755 (Fla., 1971).

Petitioner's total failure to explore any avenues of relief in the trial court has made it difficult if not impossible to accurately define the applicability of key constitutional issues to the facts of the instant case. As a result the record on appeal in this case is as yet undeveloped. Those facts which are necessary to shape out the skeleton of petitioner's constitutional challenge have been supplied not as a result of any hearing in the context of an adversary proceeding but rather in the form of suggestion by counsel in petitioner's Footnote #6.

At the least, the assertion of these additional facts raises the distinct possibility that counsel's decision to waive trial by jury may have been motivated by a deliberate choice of trial strategy. If indeed counsel had such purpose in mind in waiving trial by jury, the constitutional objection now raised would be clearly waived. As this court stated in Henry v. Mississippi, 379 U.S. 443, 451-452 (1965).

> "If [a strategic reason] motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding

> on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, See Whitus v. Balkom, 333 F.2d 496 (5th Cir., 1964), we think that the deliberate bypassing by counsel of the contemporaneous objection rule as a part of trial strategy would have that affect in this case."

Since no objection was ever made in the trial court either before or after trial that the waiver may not have been entirely knowing and voluntary the trial judge was never presented with an opportunity to explore the invalidity of the waiver. The United States Court of Appeals for the Fifth Circuit in United States v. Marcello, 423 F.2d 993, 1005 (5th Cir., 1970), citing to Henry, supra, has clearly held that an attorney's conscious waiver of a constitutional right in order to obtain a tactical

advantage for his client is then binding on the defendant. In accord is Yeloushan v. United States, 339 F.2d 533 (5th Cir., 1964), holding that a waiver bars direct appeal of the constitutional right to trial by jury in the district in which the crime was committed. See Murch v. Mottram, ____U.S.____, 93 S.Ct. 71 (1972).

Petitioner now suggests that he desired a trial by jury but was forced to accept his counsel's decision as to waiver of the jury. This suggestion is made for the first time before this Court. No challenge was made in the trial court and on appeal petitioner's only argument in his brief was that it was per se error for the trial judge not to inquire of the defendant at the time of his waiver of trial by jury. As a result, the instant record is now devoid of facts surrounding counsel's decision to waive the jury although such facts could have been brought out by hearing on a motion to vacate judgment and sentence pursuant to Rule 3.850 Fla. R.Cr. P. See Parks v. State, 263 So.2d 642 (Fla., 3rd DCA, 1972).

Petitioner now seeks to extend the reasoning of this Court's opinion in Boykin v. Alabama, 395 U.S. 238 (1969) to the instant case. Apart from the fact that Boykin was denied upon a silent record whereas in the case below the defendant executed a written waiver

of his right to a jury,* the fundamental difference between the cases is that Boykin was entering a plea of guilty, thereby admitting the ultimate issue of the trial and surrending nearly all constitutional protections. Kinser surrendered not nearly as much, his waiver going only so far as to select which trier of fact would sit at his trial. The comparison between the two situations is not compelling. Following this reasoning, Florida law provides that the execution of a written waiver of jury trial in open court by the defendant is sufficient by itself, and that the judge's failure to make further inquiry of the defendant is not grounds for reversal. Quartz v. State, 258 So.2d 283 (Fla., 3rd DCA, 1972), relying upon United States v. Hunt, 413 F.2d 983 (4th Cir., 1969) and Pool v. United States, 344 F.2d 943 (9th Cir., 1965).

* Although petitioner contends the stamped waiver form was so blurred as to be illegible, he admits in his Footnote#6 that defense counsel told petitioner he was going to waive trial by jury and petitioner "was told by his attorney what he was signing."

CONCLUSION

On the existing facts of the case at bar the federal question presented by petitioner is insubstantial. It is respectfully urged that this Court should deny jurisdiction.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

WILLIAM L. ROGERS
Assistant Attorney General
Sunset Executive Center (75)
8585 Sunset Drive
Miami, Florida 33143
(305) 279-8700

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondent in Opposition was served upon the HONORABLE PHILIP CARLTON, JR., Suite 217 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, this_____day of February, 1975.

WILLIAM L. ROGERS
Assistant Attorney General